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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

Estate of JACK WILLIAM MOON, SR., Deceased.	C061192
SHARON K. MUNOZ, Petitioner and Respondent, v. BARBARA GATELY, Objector and Appellant.	(Super. Ct. No. PR38176)

Plaintiff Barbara Gately, one of five daughters of decedent Jack William Moon, Sr. (Moon), appeals from the trial court's imposition of a constructive trust over the proceeds of the sale of Moon's property. Gately held legal title to the property. The trial court found Gately breached her promise to reconvey the property to Moon's heirs upon his death. On appeal, Gately argues the trial court erred in imposing a constructive trust. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Moon fathered eight children during two marriages. Gately was the eldest child of Moon and his wife Laverne.[1] Laverne and Moon had five younger children, including defendant Sharon Munoz. Moon also had an older daughter, Margaret, from a previous marriage.

In 1949 or 1950 Moon purchased property in Gridley from which he operated a plumbing business. Moon and Laverne divorced in 1962. The following year John Kevin was born out of wedlock to Moon.

In 1963, following his divorce from Laverne, Moon transferred title in the property to his brother and sister-in-law, Isaac and Lida Moon, for no consideration. Moon's daughter Billie testified that Moon told her the transfer was an effort to prevent his ex-wife (Billie's mother, Laverne) or the mother of John Kevin from attaching the property for nonpayment of child support.

From 1961 until his death in 2006, Moon lived on the property. He paid no rent to Isaac and Lida, who lived in Texas and never visited the property.

On August 23, 1976, Isaac and Lida transferred title in the property to Gately by way of a gift deed. Moon continued to live on the property.

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[1] For the sake of clarity, first names will be used as necessary.

In 1995 Moon executed a will that directed the property be sold upon his death and the proceeds divided evenly among the siblings, excluding John Kevin. In 2004 Gately drafted a new will and power of attorney for Moon. The 2004 will gave the property to Gately.

Following Moon's death, his daughter Sharon Munoz filed a petition to probate a lost or destroyed will (the 1995 will). Gately objected and filed a petition to probate the 2004 will, which was objected to by Moon's daughters Billie, Donna Ben-Barrak, and Munoz. A court trial followed.

Gately's Version of Events

Gately presented testimony by the escrow officer and notary public who notarized Moon's signature on the 2004 will. The notary noticed nothing unusual about Moon during the signing and stated that Gately accompanied him. The notary also testified wills are generally not notarized.

Duke Moss, a longtime friend of Moon, testified Moon was mentally sharp. Moon had a good relationship with Gately, who did not dominate him. According to Moss, Moon always said the property belonged to Gately. Moon was distant from his other daughters.

Gately's son testified Moon was "[s]harp as a tack." Gately never prevented her siblings from visiting their father. In addition, Gately's son testified Ben-Barrak knew the property belonged to Gately. A month before Moon's death, Ben-Barrak said Billie and Munoz would fight over the property.

Gately's husband, John Gately, stated the property was a gift from Moon to Gately. John characterized Moon as independent and frugal. The 1995 will was Munoz's idea; her goal was to get an interest in the property. John advised his wife not to share the property, on which the couple operated a video store from 1986 through 2006. John also characterized Moon as sharp and alert.

On cross-examination, John acknowledged that Gately agreed to share the property in the 1995 will. However, John stated that Munoz pressured Moon into making the will. Under pressure, Moon asked if Gately was willing to share the property.

Gately testified her father sold the property to Isaac and Lida in 1963. Moon lived on the property but did not own it. Gately paid the taxes on the property from 1976 through 2006.

According to Gately, Munoz typed the 1995 will. Moon felt pressured, and to take the pressure off her father, Gately agreed to share the property. Moon later told her the 1995 will had been "trashed."

In 1997 Moon changed his mind about the 1995 will after he gave Ben-Barrak, Billie, and Jack Moon, Jr., $50,000 each. Moon had just pulled out of an agreement to purchase property for Ben-Barrak and instead decided to give the siblings money. Moon became disillusioned with the way two of the siblings spent the money. He told Gately the 1995 will was the worst mistake he ever made.

In 2004 Moon decided he wanted a new will to put his wishes down on paper. Moon wanted Ben-Barrak to have power of attorney

along with Gately. Gately sent the 2004 will to Ben-Barrak, who signed it as a witness and returned it. Gately and Moon went to the title company to have the will notarized. Moon signed the first page, became weak, and sat down. He then signed the second page.

After Moon's death, Gately disbursed his monetary assets according to Moon's wishes. Moon also wanted his children to sign for the money and not ask for anything else. Gately's siblings refused to sign.

On cross-examination, Gately stated Moon sold the property to Isaac because he needed the money. While Gately was living in San Jose, Isaac phoned her and asked if she wanted to go home to Gridley. Gately answered, "[Y]es, very badly." He then told her the plan was to give her the property so she could return home to live. Gately testified Isaac gave her the property because he said she was special.

As for the 1995 will, Moon did not direct her to share the property; he simply asked her if she was willing to share. The 2004 will was his decision, made after a hospitalization. Gately identified the signatures on the 2004 will as her father's. The difference in the appearance of the signatures on the first and second pages of the 2004 will was because Moon became very shaky after signing the first page.

Gately acknowledged that Ben-Barrak signed the will before Moon signed it. Gately sold the property for $350,000. It was in need of repair.

Ben-Barrak's, Billie's, and Munoz's Versions of Events

Ben-Barrak testified she was not aware of Moon's transfer of the property to Isaac. Moon always said he owned the property and that it was to be distributed equally among his children. Ben-Barrak stated Gately thought their father owned the property.

Ben-Barrak improved the property by putting in toilets, a refrigerator, and a shower. Her husband, who used part of the property, paid rent to Moon.

Gately sent Ben-Barrak a document that Gately stated was a power of attorney. Ben-Barrak signed the document, which was the second page of the 2004 will. Ben-Barrak never saw the entire will; she just signed the second page. Ben-Barrak believed she was signing a power of attorney. According to Ben-Barrak, Moon's signatures on the first page of the 2004 will did not look like her father's signature. Ben-Barrak testified Moon never expressed to her any displeasure regarding his children.

After Moon's funeral, Gately gave Ben-Barrak $10,000 and asked her to sign a document. Gately announced the property belonged to her. Previously, Gately had stated the property was in her name only for safekeeping; she never said their father did not own the property.

Billie testified that Moon transferred the property to Isaac and Lida in 1963 to prevent his ex-wife or John Kevin's mother from getting it. No money changed hands in the transaction. According to Billie, Moon told her Isaac and Lida transferred the property to Gately "since she was the eldest

daughter, for safekeeping for his heirs. He did not want the property to be attached by someone for some debt, . . . a lien placed on it for nonpayment of child support."

Gately never told Billie that Moon did not own the property. Instead, Gately told her siblings she was holding the property for them. In 1991 Gately expressed an interest in purchasing the property. She also told Billie she was not going to fix up the property because she would not get the money back.

In 1991 Moon asked Munoz to send a letter to all his children asking what they wanted done with the property when he died. All of the children agreed the property should be sold upon his death and the proceeds divided evenly. Gately responded that she agreed the property should be sold, but requested that she and her husband have the option to purchase the property for fair market value.

Munoz prepared the 1995 will and notified everyone of its contents. Gately kept the original of the 1995 will.

Following Jack, Jr.'s, death in November 2003, Moon, deeply upset, began to decline. Billie became concerned with Moon's mental and cognitive skills and asked Gately about it. Gately became very aggressive and said there was nothing wrong with Moon. Gately also rebuffed Billie's suggestion that they have their father checked by a physician.

In October 2004 Moon was hospitalized with pneumonia and congestive heart failure. Billie visited him and found him "definitely not cognizant." Again, Gately refused to discuss their father's mental condition. Moon was released from the

hospital on October 23, 2004; the second will was dated October 27, 2004.

Following Moon's death in 2006, Gately produced the 2004 will. Billie was shocked, since it was the first time Gately stated she owned the property. According to Billie, the signatures on page one of the 2004 will were not Moon's signature. Billie testified that following her father's death, jewelry, coins, and about $60,000 were missing from her father's estate.

Munoz testified that in 1991 Moon contacted her about making a will. They discussed several alternatives for disposition of the property, and Moon decided Gately should have the first right to purchase the property at the market rate. Moon took no further action for four years.

In 1995 Munoz, with Gately present, typed Moon's will. Gately never asserted ownership in the property. In the 1970's Gately told Munoz that the property had been transferred into her name "for safekeeping for all of us children." In the will, Moon split the proceeds from the sale of the property among his six children. Munoz saw Moon sign the will and give the will to Gately.

Munoz stated that Moon did not believe in banks and kept large sums of cash in a money box. Gately had a key to the box. In the summer of 1999 Munoz and Gately counted the money, which totaled about $180,000.

Following Moon's death, Gately showed her siblings the 2004 will. She also handed out a release. According to Munoz, the signatures on the 2004 will were not her father's signature.

David Moore, a forensic document examiner, examined the 2004 will. According to Moore, the signatures on page one of the 2004 will were not written by the person who signed the second page.

Gately's Rebuttal

According to Gately, Moon did not want the 1995 will. Moon asked her if she would be willing to share the property with her siblings. Gately testified Moon kept the original of the 1995 will. Everyone knew the property belonged to her.

The Trial Court's Decision

The court found Moon transferred the property to Isaac and Lida for safekeeping, to keep it away from his ex-wife. They held the property for the benefit of Moon and his heirs. Similarly, Isaac and Lida transferred the property to Gately for safekeeping for Moon's benefit.

The court noted: "The evidence was substantial through the words and actions of [Moon] during his lifetime that he and all the children always considered the real property as belonging to [Moon]. [Moon] lived on the property in the only residence on the property until his death. He referred to <u>his</u> real property in both of the wills that are subject to these proceedings. He directed [Munoz] to send out a letter to all the children asking what they wanted done with his property when he died. All responded with their wishes and none contested the fact that

this was [Moon's] property, including Barbara Gately who knew the title to the property was in her name."

As for the 2004 will, the court found Munoz signed the will as a witness before Moon signed the will, disqualifying Munoz as a witness.[2] Since Gately, the only other witness, was an interested party, she bore the burden of showing the will was not procured by duress, menace, fraud, or undue influence. Gately failed to meet this burden and the court determined the 2004 will was invalid. The court imposed a constructive trust and admitted the 1995 will to probate.

Following entry of judgment, Gately filed a timely notice of appeal.

DISCUSSION

Gately argues an oral trust may vary an absolute transfer of real property only if the trust is created and its terms agreed to prior to the execution of the absolute transfer. Therefore, since none of the witnesses participated in the negotiations leading up to the transfer from Moon to Isaac and Lida, the trial court erred in imposing a constructive trust on the property. Her statement of legal principle is correct but her conclusion, resting as it does on incorrect evidentiary notions, is flawed.

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[2] Although the trial court identified "Sharon" in the statement of decision as the disqualified witness, it was in fact Ben-Barrak who signed the 2004 will before Moon signed it.

As expressed by the Supreme Court in *Sherman v. Sandell* (1895) 106 Cal. 373 (*Sherman*), the case from which Gately extracts the rules on the imposition of a constructive trust, "It is well established that although a conveyance of lands is absolute in terms, and on its face purports to convey an estate in fee, it may nevertheless be shown that the lands are held by the grantee in trust; and that the terms of such trust may be shown by oral testimony. In order, however, that the lands so conveyed may be impressed with a trust, the trust must be created and its terms agreed upon by the parties to the instrument at the time of its execution, or the instrument must be executed in pursuance of such previous agreement. An absolute conveyance of lands cannot, after its execution, be turned into a trust by any oral declarations of the parties thereto." (*Id*. at pp. 374-375.)

The *Sherman* Court also discussed the evidence necessary to establish such a trust: "It is also well established that the evidence which will authorize a court to find that a conveyance of lands which is absolute in terms was in reality made upon a trust must be clear, satisfactory, and convincing; that the parties to an instrument which is clear and unambiguous in its terms must be presumed to have intended the legal effect of those terms, unless it is clearly and satisfactorily shown that it was their mutual intention that those terms should have a different effect. [Citations.] The burden of proof . . . is upon the party who claims contrary thereto, and he must establish his allegations by a preponderance of evidence. If

the verbal declarations are contradictory or uncertain, the presumption that the instrument correctly expresses the agreement between the parties is not overcome." (*Sherman*, *supra*, 106 Cal. at p. 375.)

Gately distills from the record the following summary of the relevant evidence: ". . . Jack Moon's 1963 recording of the grant deed transferring the Property to Isaac and Lida Moon was prima facie evidence that he made an absolute transfer of the Property to Isaac and Lida Moon; and the recording of Isaac and Lida Moon's 1976 gift deed transferring the Property to Barbara Gately was prima facie evidence that they made an absolute transfer of the Property to Barbara Gately such that Barbara Gately owned the Property absolutely." As Gately views the record, it is bereft of any admissible evidence of an oral agreement sufficient to counter evidence of the absolute transfers and the subsequent recording of the transfers. We view the record and the law differently.

With respect to appellate review of constructive trust claims, the court in *Sherman* declared: "This issue is purely one of fact, and is to be determined by the trial court, and to the extent that its determination rests upon the mere preponderance of evidence, or upon the consideration of conflicting or contradictory evidence, the finding of the trial court is not open to review in this court. [Citation.]" (*Sherman*, *supra*, 106 Cal. at p. 375.)

In considering whether the trial court erred in imposing a constructive trust, we do not weigh or resolve conflicts in the

evidence or judge the credibility of witnesses. On the contrary, if any substantial evidence, contradicted or uncontradicted, or any reasonable inferences therefrom will support the judgment, we uphold the judgment. (*Van Ruiten v. Van Ruiten* (1969) 268 Cal.App.2d 619, 623.)

Gately's claims to the contrary notwithstanding, courts may consider statements and evidence made subsequent to the challenged transfer. In *McRae v. McRae* (1924) 67 Cal.App. 480, the appellate court considered statements made subsequent to a transfer of property in support of a constructive trust. The appellant argued these statements could not be considered unless they directly referred to the acts or statements of the parties at the time the transaction consummated. The court cited *Sherman* but concluded: "So, while it is true, that a constructive trust cannot be created by a naked promise of the grantee after conveyance made to him, it is equally true that his declarations showing the existence of a trust at the time he accepted the conveyance, afford strong evidence against him in the establishment of the trust . . . ." (*Id.* at p. 485, quoting *Taylor v. Morris* (1912) 163 Cal. 717, 722.)

In *Estate of Aiello* (1980) 106 Cal.App.3d 669, the court found a significant sum, which had been deposited in a joint tenancy savings account, was held by the defendant in a constructive trust for the beneficiaries of the cotenant's will and ordered the defendant to transfer the money to the estate. The court imposed the constructive trust based in part on letters that were probative of the deceased cotenant's intent

that the heirs named in her will should receive the proceeds of the account and that the defendant was no more than an administrator. The trial court noted of the letters, written after the deceased converted her savings account into a joint tenancy account: "'It is quite evident to the Court from reading the letters that at all times the object of her bounty were to be those who were mentioned in her Will.'" (*Id.* at p. 675.) The appellate court found sufficient evidence to support a constructive trust: "The letters clearly indicate that her intent was that the heirs named in the will should receive the bulk of her estate -- the account -- and that [the defendant] was to be no more than an administrator who would get 'his cut' as decedent put it in her first letter." (*Id.* at p. 676.)

Similarly, in *Day v. Greene* (1963) 59 Cal.2d 404 (*Day*), the Supreme Court found sufficient evidence that there had been an agreement to make a will. The decedent made a will leaving everything to his second wife after orally agreeing with her that upon her death, she would provide for the plaintiff, her husband's daughter from a prior marriage. That daughter would share and share alike with the children of the second wife. The second wife died, leaving everything to her children and nothing to the plaintiff. The plaintiff brought an action against the second wife's children, claiming her stepmother entered into an oral contract with her father in which she agreed to include the plaintiff in her estate. The trial court rendered judgment in favor of the plaintiff, and the appellate court affirmed.

Among the evidence considered by the court was the plaintiff's surprise at being omitted from her father's will, and her stepmother's assurance that "'Your father and I . . . agreed that he would leave everything to me in my lifetime and that I would take care of you upon my death, that you would share with my children, share and share alike.'" (*Day*, *supra*, 59 Cal.2d at p. 407.) The court also noted the plaintiff relied upon the agreement and did not attempt to enforce her claims against her father's estate until she learned the contents of her stepmother's will. (*Id.* at p. 409.) In addition, at least some of the property had been transferred to the plaintiff's stepmother in an effort to protect it from claims of possible creditors. (*Id.* at p. 410.) The court found "ample evidence" to support the finding of a constructive trust and "it could reasonably be inferred that [the plaintiff's father] relied on his agreement with [the plaintiff's stepmother] for the protection of [the plaintiff] and that for this reason he abstained from revoking the trust and making any other provision for her." (*Ibid.*)

Munoz introduced testimony by both Gately and Billie that neither Isaac nor Lida ever set foot on the property. Moon never paid rent to Isaac and Lida, but instead ran his business out of the property. This evidence underscored Moon's desire that Isaac and Lida hold the property as a safeguard against his ex-wife, not as an absolute transfer to his brother and sister-in-law.

Again, Gately disputes the relevance of this evidence, arguing *Sherman* held such subsequent statements are inadmissible to vary the terms of the 1963 and 1976 absolute transfers. *Sherman* stated an absolute conveyance in land cannot, after its execution, be turned into a trust by the statements of the parties. *Sherman* did not prohibit or discount circumstantial evidence; instead, it stated the parties could not turn an absolute conveyance in land into a trust merely by stating, after the fact, that they intended a trust. (*Sherman*, *supra*, 106 Cal. at p. 375.)[3]

As for the transfer from Isaac and Lida to Gately in 1976, Gately argues disputed testimony about whether Isaac and Lida transferred the property to her in order for her to pass it on to her siblings on Moon's death does not support the trial court's decision. According to Gately, she "disputed the oral declarations that the Property was transferred to her so that she could pass it on to her siblings, the verbal declarations to vary the terms of the grant deed are contradictory and the burden of proof to vary the terms of the grant deed has not been met. As a result, the presumption that the grant deed transferred the Property to Barbara Gately free of trust stands."

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[3] Although Gately implies the trial court found Moon adversely possessed the property, we find no such implication in the trial court's statement of decision.

Again, Gately ignores the evidence presented at trial, evidence the trial court carefully considered in imposing the constructive trust. Since neither Moon nor his brother and sister-in-law testified regarding the 1976 transfer to Gately, the court examined the evidence surrounding the ownership of the property following the transfer.

The court noted Gately, the eldest daughter, was in a position of trust and confidence. When Gately moved to the area and began caring for her father, her confidential position strengthened. All of the testimony, including Gately's, painted a picture of Moon as the owner of the property despite its being held in Gately's name. Gately did not object when Moon directed Munoz to solicit his children's opinions as to what should be done with the property following his death.

In addition, the court questioned Gately as to why she allowed Moon to sign a will in 1995 that stated the property belonged to him and that it would be sold with the proceeds distributed to all of the children equally. Gately responded that her father had merely asked her if she was willing to share the property with her siblings.

Gately only asserted ownership in the property following Moon's death, when she produced the 2004 will following his funeral. Prior to Moon's death, Gately acquiesced in Moon's treatment of the property as his own; she did not object to her siblings' vote on how the property should be divided or to the 1995 will. Gately and her husband also sought to purchase the property from Moon's estate upon his death. Although Gately now

states the transfer from Isaac and Lida was not to keep the property in trust for her siblings, all her actions prior to Moon's death suggest otherwise. Given the testimony at trial, substantial evidence supports the trial court's imposition of a constructive trust on the proceeds from the sale of the property.[4]

The court imposed the trust pursuant to Civil Code section 2224, which states: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

Gately argues Civil Code section 2224 is inapplicable and the trial court committed reversible error in imposing a constructive trust. According to Gately, the court "failed to

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[4] The trial court also considered evidence that Moon told his daughter Billie he was going to transfer the property to Isaac and Lida for safekeeping. The transfer, Moon told Billie, was an effort to keep the property out of his ex-wife's reach and to prevent the mother of his child born out of wedlock from attaching the property for child support. Billie also testified Isaac paid Moon nothing for the property.

At trial, and on appeal, Gately argues Billie's testimony is inadmissible hearsay; the trial court erred in admitting the testimony under the state of mind exception to the hearsay rule. Irrespective of the admissibility of Billie's testimony, as already discussed, there was ample evidence from other sources of Moon's intentions.

fairly disclose the evidence on which it found that Barbara Gately wrongfully acquired the Property."

However, the court painstakingly outlined the evidence that Isaac and Lida transferred the property to Gately for safekeeping, as the trusted eldest daughter who was caring for her aging father. During Moon's lifetime, Gately remained silent as he and his children treated the property as his own. Only after his death did Gately produce Moon's will stating the property belonged to her and her alone. Gately sold the property and kept the proceeds. Her failure to honor her promise to her father and share the proceeds with her sisters constitutes the wrongful act sufficient to invoke Civil Code section 2224.

DISPOSITION

The judgment is affirmed. Munoz shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

RAYE, Acting P. J.

We concur:

ROBIE, J.

BUTZ, J.